Supreme Court, U.S.
FILED

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Supreme Court of the United States OFFICE OF THE CLERK

October Term, 1994

No.

GAETANO MIELE and DOROTHY MIELE, husband and wife; MARGUERITE CHERIPKA, Individually and on behalf of the Estate of James Cheripka,

Petitioners

v.

PERINI CORPORATION, MERIDIAN MORTGAGE CORPORATION, STEVENS & WILKINSON, INC., ATLANTIC PALACE CONDOMINIUM ASSOCIATION, AND METALAN ERECTORS, INC.

Respondents

Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

PETITION AND APPENDIX FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This is a consumer protection case brought by and for purchasers of 293 fully furnished "luxury" condominium units at a 32-story high-rise structure built at the Boardwalk in Atlantic City. Due to construction defects and building code violations, the apartments were wet, musty, unventilated, and many uninhabitable. Persons, investors, retirees, and married couples from Pennsylvania, Connecticut, New York, New Jersey, and generally from among the States--some losing their life savings--allege that the units were promoted and sold by false and deceptive statements and closing documents placed in the mails or shipped to their homes via Federal Express and other interstate carriers. Defendants--builder, sponsor, lender, architects, sponsor's mortgage subsidiary-

-inducing sales by offers of a 90% mortgage, knew of the defects in advance but had huge sums at stake and knowingly decided to proceed with the promotion and sale of the units without disclosure. In granting summary judgment to each of the defendants, did the Federal District Court fail to carry out a firm Congressional policy shown, e.g., by the Interstate Land Sales Full Disclosure Act, 15 U.S.C., §1701, et.seq., and by the penalties for frauds and swindles done by mail, 18 U.S.C., §1341, to prevent false and deceptive practices in the interstate sale of real estate?

2. Did the Third Circuit, by affirming a summary judgment, fail to rescind plaintiffs' Atlantic Palace purchases, leave defendants with their wrongful gains, and thereby depart from decisions of the First and Second Circuits upholding Congressional policy on

fraudulent interstate sales?

3. Where the purchasers' actions to rescind and for damages were consolidated, and many of the claims were settled under an agreement reached between defendant and the condominium's board of directors, was the summary judgment entered against the appellants (nonsettling unit owners) on the stated ground that their individual cases required further expert reports and expert proofs at trial

(a) a misuse of Rule 56 by denying access to the Court to the nonsettling unit owners?

(b) a radical departure from the accepted course of judicial proceedings in denying summary judgment in cases involving disputed facts on well-pleaded issues?

(c) a misconception that plaintiffs could not at trial adduce, subpoena, and otherwise rely on expert reports, official

investigations, defendants' admissions in depositions, and other proofs of the defects developed in extensive discovery?

(d) in actuality, a drastic, manifestly unjust sanction against the nonsettling plaintiffs for their decision as unit owners not to settle but to seek rescission of their individual purchases?

PARTIES

Pursuant to R.14(b), the parties to the consolidated actions in the Federal District Court were James Cheripka and Marguerite Cheripka, husband and wife; Anthony Guzman and Thelma Guzman, husband and wife; Gaetano Miele and Dorothy Miele, husband and wife; Hsien Pin Mung; Thomas Traino and Joann Traino, husband and wife; Albert Algazi and Judith Algazi, husband and wife; Steffan A. Franklin and Geraldine Franklin, husband and wife; Rajinder P.S. Chawba and Satinder K. Chawba, husband and wife; Sukhdev S. Bhalla and Sulochana Bhalla, husband and wife; Bhuleshwar S. Darji and Sushila B. Darji, husband and wife, joint owners; William Tilley and Louis Pulgrano, joint owners; Kent P. Hastings and Joanne M. Hastings, husband and wife; Stephen J. Barberino, Sr., Joseph D. Arute, Stephen J. Barberino, Jr., joint owners; and

Stephen J. Barberino, Jr.; known as the "Portagallo Group" of unit owners. They were permitted to intervene in the Wright action in the District Court where all claims of unit owners and of the Atlantic Palace board of directors were consolidated due to the similarity of the unit owner claims made in the state and federal courts.

Defendants in the consolidated federal action included the builder, Perini Corporation; the bankrupt sponsor, Resort Development Corporation ("RDC"); an institutional lender offering to finance unit owner purchases, Meridian Mortgage Corp.; architects, Stevens & Wilkinson, Inc.; and the following Perini subcontractors: Altman Carpentry, Inc.; Alumiline Corp.; Vistawall Architectural Products, Divs. of Butler Mfg. Corp; Anastasi Brothers; Atlantic Plate Glass; Claremont Interior; Joseph Fabi, Inc.;

H.H. Robertson Div. of Western Architectural Systems; Labov Mechanical Contractors; I.C. Thomasson Associates, Inc.; Keystone Engineering Corp.; Stanley D. Lindsay & Associates, Limited; Mid State Filigree Systems; Lipsteel Fabrications; Harry S. Peterson Company; Rich Fire Protection; Daniel Sanders & Company; Thomas Roofing and Sheet Metal, Inc.; and R. Wigand & Sons.

Other defendants in the District Court were U.S. Capital Corporation; Atlantic Palace Condominium Association; First Resorts of New Jersey, Inc.; John Doe, a fictitious name; XYZ Corporation, a fictitious corporate name; the sponsor's president and other officers responsible for false representations; and the sponsor's sales agents, together with the following defendants providing construction surety bonds: Fidelity and Deposit Company of Maryland; North

American Reinsurance Corp.; and Prudential Reinsurance Corp.

Prior to RDC's bankruptcy, the Hastings entered into a separate settlement with the sponsor for rescission of their sale and for the recovery of their fees and costs; when the settlement was breached by RDC's bankruptcy, the Hastings joined in the appeal to the Third Circuit, but their case for breach of the settlement was dismissed for lack of standing, and they are not petitioners here.

Atlantic Palace Condominium Association, Inc., took no position on petitioners' appeal to the Third Circuit.

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No.

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PERINI CORPORATION, MERIDIAN MORTGAGE CORPORATION, STEVENS & WILKINSON, INC., ATLANTIC PALACE CONDOMINIUM ASSOCIATION, AND METALAN ERECTORS, INC.

Respondents

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Gaetano Miele and Dorothy Miele, his wife, and Marguerite Cheripka, individually and on behalf of

the estate of James M. Cheripka, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 29, 1994.

OPINION BELOW

The Judgment of the Court of Appeals appears in the Appendix hereto. The Judgment of the Third Circuit affirmed the opinion and summary judgment dismissing petitioners' cases entered in the United States District Court for the District of New Jersey. The District Court's opinion is contained in a United States Magistrate Judge's letter Report and Recommendation filed June 17, 1993; the District Court's interlocutory order dismissing petitioners' complaint for the reasons set forth in the Report and Recommendation, dated June 25, 1993; and the District Court's final order of dismissal entered

December 3, 1993. The Report and Recommendation, opinion, and interlocutory and final judgments of the District Court also appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on December 29, 1994. This Court's jurisdiction is invoked under 28 U.S.C., §1254, of the Judicial Code, authorizing review by this Court by writ of certiorari of cases decided in the courts of appeals upon the petition of any party to the action, before or after rendition of the judgment or decree. The basis for federal jurisdiction in the court of first instance was an order entered by the United States Magistrate dated October 25, 1990, granting the motion of petitioners and other unit owners to intervene as a matter of right under Fed.R.Civ.P.24(a) in the case brought by the condominium board

of directors and other unit owners, entitled Donald W. Wright, et al v. Perini Corporation, et al, Docket No. 90-189, insofar as their complaint sets forth the same claims and names the same defendants.

STATUTORY PROVISIONS INVOLVED

1. ***United States Code, Title 18:***
§1341. Frauds and Swindles

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell. . .any counterfeit or spurious. . .security or other article . . ., places in any post office. . .any matter or thing whatever to be sent or delivered by the Postal Service. . .shall be fined or imprisoned not more than five years, or both. If the violation affects a financial institution, such persons shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

2. ***15 U.S.C., §1701-1720 (1988); Interstate Land Sales Full Disclosure Act***

3. ***N.J.S.A.46:8B-4. Status of units.***
"Each unit shall constitute a <u>separate parcel of real property</u> which may be dealt with by the owner thereof in the same manner as is otherwise permitted by law for any other parcel of real property." (Emphasis added)

CIVIL PROCEDURE RULES INVOLVED

1. ***Fed.R.Civ.P. 56(c) - Summary Judgment***
"(c) Motion and proceedings thereon. . . .The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

2. ***Fed.R.Civ.P.56(f):***

"(f) When affidavits are unavailable. Should it appear . . .that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits . . .depositions. . . or discovery. . .or may make such other order as is just." (Emphasis added)

STATEMENT OF THE CASE

This litigation arises out of the marketing, financing, and sale of defective condominium units at the Atlantic Palace 293-unit condominium by defendants commencing in 1986. Because of construction defects and difficulties, the condominium association, through its board of directors, filed this action in the Federal District Court for the District of New Jersey in an action entitled Donald W. Wright, et al v. Perini Corp., et al, Civil No. 90-189 (JEI)(Consolidated). The petitioning unit owners were interveners in the Wright litigation. There was extensive discovery taken in the Wright litigation, and there were numerous admissions on file on the basis of which the action, and the various construction defects, could be proved at trial. In addition, the condominium association, in

conjunction with RDC, Perini, and Meridian, had caused investigations to be made as to the problems at the condominium.

One of these reports, that of Zetlin-Argo Structural Investigations, Inc., concluded as to the defects in construction, as follows:

> "They do not provide tenants with minimum requirements for comfort and health:
>
> a. Lack of ventilation has contributed to growth of fungus (mold).
>
> b. Lack of ventilation has contributed to existing unpleasant odors throughout the Tower.
>
> THE ATLANTIC PALACE RESIDENTIAL UNITS WERE NOT PROVIDED WITH VENTILATION AIR AS DEFINED AND MANDATED BY THE CODE AND IN COMPLIANCE WITH ACCEPTED PRACTICE."

The purchasers included retirees, married couples seeking second homes, and other persons and investors not only from Pennsylvania and New Jersey, but from

among the States, and many of them had used, and were about to lose their life savings, particularly if it is the case that the units cannot be readily repaired. The action involved both the individual claims of unit owners and the claims of the board of directors of the condominium association for the defects and damages to the common elements. With respect to the common elements, the case was essentially a class action brought for all 293 unit owners. This was not the case, however, with respect to the losses and damages sustained by each of the plaintiff unit owners. Their individual condominium units had been purchased as separate parcels of real estate and were treated as such under the New Jersey Condominium Act, N.J.S.A.46:8B-1, et seq.

The action was mediated in the District Court, and a settlement agreement involving a compromise among the settling

parties, including the condominium's board of directors, emerged. A sum in excess of $10 million was promised in the settlement to fund extensive repairs to be made and paid for by the board. The settlement also involved certain more favorable lending terms offered by Meridian Mortgage in compromise of any further liability by it to the settling owners. It had financed and promoted many of the purchases with full knowledge of the defects.

The settlement agreement, however, did not involve defendants' willingness to rescind any of the sales or refund of purchase monies, as had earlier been arranged for by the Hastings in their separate settlement with the bankrupt sponsor. In addition, a number of the unit owners feared that the $10 million promised in the settlement would be insufficient to correct the defects. The water problems, ventilation difficulties,

and other defects had caused extensive infiltration, excess humidity, and damage to carpets, wall coverings, and furniture, and there were continuing problems of mustiness, condensation, and odors largely due to the lack of an adequate ventilation system built to comply with local building codes.

Defendants filed three summary judgment motions in the District Court against the non-settling unit owners. They were represented by the same attorney who was appearing for those unit owners agreeing to the settlement, and a continuance was plainly required, as a matter of fundamental fairness and justice to litigants, to enable the non-settling unit owners, the petitioners here, to obtain the assistance of counsel to represent them in opposition to defendants' motions and to take the necessary measures to preserve their claims.

Nevertheless, despite extensive discovery taken in the consolidated actions, the District Court routinely granted defendants' summary judgment motions, failing to recognize the essentiality of insuring that the non-settling unit owners were being effectively represented by independent counsel. It was ruled that the non-settling unit owners' claims "cannot be established without the aid of expert testimony" and, on the ground that the attorney had failed to submit separate experts' reports by an established deadline, a United States Magistrate recommended that the cases be dismissed. This was despite the explicit finding in the Magistrate's report as follows:

> "The experts' reports prepared in this action are voluminous and reveal the inherent complexity of a case involving the structure, engineering, and design of a 30 story complex." (Magistrate's Report, at p.5)

Finding further that the unit owners had no right to use the expert reports obtained by their own association's directors, the Magistrate determined that proof of the water, leakage, vermin, fungi, contaminants, and other odors and problems at the condominium were not anticipated as adequate proofs at trial, and an outright dismissal was recommended.

Upon the recommendation that the anticipated lack of expert testimony at trial would be "fatal to their cause of action", the District Court granted a summary dismissal of the non-settling unit owner cases in an interlocutory order entered on June 25, 1993. Finding that the claims of the third, fourth, and fifth parties had been settled, the District Court entered a final judgment dismissing all of the Atlantic Palace consolidated actions, with prejudice, on December 1, 1993. The Third Circuit Court of Appeals

affirmed the dismissal without opinion.

The Mieles had purchased their unit #601 for $235,000 in 1988. The Cheripkas purchased their unit #2910 for $172,000 in 1987. The dismissals ordered by the lower courts left them remediless. This was despite the cartons of depositions that had been taken and despite proof of the mailings by which the defendants had promoted and marketed the units.[2]

REASONS FOR GRANTING THE WRIT

1. THE DECISIONS BELOW CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO ENFORCEMENT OF THE CONGRESSIONAL POLICY TO PREVENT FALSE AND DECEPTIVE PRACTICES PROMOTING PROPERTY SALES BY USE OF MAIL AND OTHER INTERSTATE FACILITIES AND GIVING A BROAD APPLICATION TO 18 U.S.C., §1341

Undisclosed either to the unit owners or

---

[2] For example, in a mailing dated March 31, 1987, to her Paramus office, Marguerite Cheripka was advised that the Atlantic Palace would be "an elegant self-contained resort with all the amenities and conveniences of a fine hotel." In another promotional distribution, the project was described as a "palatial 30-story condominium" that "now towers over the Atlantic City skyline."

to the public was that the defendants had been aware in the Fall of 1986 and in the early months of 1987 that there were substantial water infiltration and ventilation problems at the condominium, rendering the units subject to leakage and, because of mustiness and lack of ventilation, virtually uninhabitable, particularly to older couples nearing retirement.

After purchase by the Mieles, there were abundant proofs of the inspections and expert reports of the problems, not to mention a letter written to the Mieles stating the water problems are so severe that they are having a damaging effect on the long-term reputation of the Atlantic Palace. It seemed that the individual apartments had been provided with heat pump units. The windows were fixed, and the result was that there was no outside air serving to provide circulation.

Without natural ventilation, the building failed utterly to comply with BOCA building requirements.

Meridian's senior vice president, James Fogarty, testified in a deposition that Meridian had received a fee of 1.5% on a $44,500,000 loan "on the front end", and he further admitted "we made a determination to move the project forward . . .keep them [the mortgage loans] in portfolio hopefully for some period of time and then at a later date package them ourselves. . . ." As of the time of his deposition, Meridian still owned $23 million in mortgages on Atlantic Palace units.

It was plain that the petitioners' case was brought for defendants' fraud and nondisclosure. Each of them had knowledge of the water infiltration and ventilation problems prior to the individual condominium sales. Instead of disclosing

such problems, defendants, because of the substantial amounts involved and invested in the project, knowingly elected to go forward with the sales and closings without disclosure. Any anticipated lack of expert testimony at the trial was not "fatal" to this claim.

The policy of the law--to prevent false and deceptive practices in the interstate sale of real estate--has been provided by Congress. In 18 U.S.C., §1341, entitled "Frauds and Swindles", Congress broadly provided:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. . . places in any post office. . .any matter or thing whatever to be sent or delivered . . .shall be fined. . . or imprisoned. . . ."

In United States v. Rendini, 738 F.2d. 530 (1st Cir. 1984), it was held that the

purpose of this provision of the mail fraud statute is to protect the integrity of the mails. In its regulation of commerce among the States, Congress has seen fit to provide that the mails are not to be used to implement fraudulent schemes "of any kind". Id., 738 F.2d, at p.533.

Neither can the dismissal ordered below be reconciled with the decision of the Second Circuit in United States v. Amrep Corp., 560 F.2d 539 (2d Cir. 1977). Amrep dealt with the sale of unimproved parcels, but the facts were otherwise similar to those involved here. The defendants-developers had purchased, for $17.8 million, a large tract of land known as Rio Rancho Estates, some 15 to 20 miles northwest of Albuquerque. They converted the tract into 77,000 lots, and the lots were sold to defrauded purchasers, many not living in New Mexico. The buyers, for example, were falsely told that

Albuquerque was "bursting at the seams" with people and could grow only in one direction, to the northwest, because the city was surrounded on the other three sides by mountains or by government lands. Sales agents represented that Rio Rancho was "where the City must grow to, grow into, and grow out of." 560 F.2d, at 543. The defendants realized $170 million in sale proceeds, nearly 10 times more than the cost of the tract. Various promotions had been undertaken in which purchasers were told that principles of financial leverage could produce gains to the lot purchasers of 150% annually. Compare the representations made here that under Meridian Mortgage financing, 90% of the purchase costs could be borrowed under first mortgage loans provided by the sponsor's institutional mortgage lender.

The Second Circuit held:

"A scheme to defraud may consist

> of numerous elements, no particular one of which need be proved if there is sufficient overall proof that the scheme exists." 560 F.2d, at 546.

The Court held that the overall scheme to defraud had been shown by the proofs and that the case made for the lot purchasers was one that was properly submitted to the triers of the fact. It held:

> "The bona fides which appellants assert is demonstrated by their program. . .permitting the exchange of unimproved for improved property was also for the triers of fact." Id., at p.544

The Court stated:

> "[Appellants] confused the scheme to defraud, which is the gist of the offense, with the means adopted to effectuate that scheme." Ibid.

The issue of the existence vel non of a scheme among the defendants to defraud was held to be a fact issue, for lay testimony by the lot purchasers, and there was no mention of the necessity for expert

testimony to determine the facts.

From the standpoint of Congressional intent to prohibit the use of interstate commerce and the mails to promote a false and fraudulent scheme to sell "any matter or thing whatever", it is impossible to reconcile the First Circuit's decision in Rendini and the Second Circuit's decision in Amrep with the dismissals of the petitioners' cases ordered below. Amrep is, of course, factually distinguishable to the extent that it deals with the sale of unimproved tracts of land as opposed to the sale in interstate commerce of furnished units in a vertical condominium regime containing separate parcels of real estate. There is no question but that the Interstate Land Sales Full Disclosure Act, 15 U.S.C., §1701-1720 (hereinafter "the Disclosure Act"), was designed to prevent false and deceptive practices in the sale of unimproved tracts of land. See, for

example, limiting its application, Flint Ridge Dev.Co. v. Scenic Rivers Ass'n., 426 U.S. 776, 96 S.Ct. 2430, 49 Law Ed.2d 205 (1976), Reh.Den. 429 U.S. 875, 97 S.Ct. 198, 50 L.Ed.2d. 159 (1976).

But the factual difference--improved vs. unimproved parcels--is not material in Congress' determination to prevent false and fraudulent practices being used in sales made in interstate commerce. As held in Olsen v. Lake Country, Inc., 955 F.2d 203 (4th Cir.1991), a suit by purchasers of lots against a corporate vendor for violations of the Disclosure Act, the language of the Act is to be read in the light of its purpose and the evil to which it was addressed:

> "More important, is the undisputed purpose of the Act to prohibit fraud and to protect purchasers of land which is part of a common promotional scheme. . . .The language of the Act is meant to be read broadly to effectuate this goal." 955 F.2d, at 205.

Similarly, in Winter v. Hollingsworth Properties, Inc., 777 F.2d 1444 (11th Cir. 1985), the scope of the Disclosure Act was not limited to the sale of raw land. In Olsen, instead of ventilation and water leakage difficulties, water and sewer service to the lots sold was found to be grossly inadequate to meet the needs of all of the lots in the development, contrary to the developer's representations.

Examine the logic of a legal system that protects interstate purchasers of unimproved lands against fraud by developers, but at the same time, dismisses cases involving false and deceptive promotions by condominium developers on summary judgment for an anticipated inability to produce at trial experts hired and paid for individually by the unit purchasers. Petitioners submit that the fact that the Disclosure Act does

not in terms apply to the sale of unimproved tracts does not confer a license on condominium land developers to engage in fraud actionable at common law if for any reason not within the scope of the frauds and swindles prevented in interstate commerce by the statutory sanctions against mail fraud.

II. THE UNIT PURCHASERS WHO DEEMED THE SETTLEMENT INADEQUATE TO COMPENSATE FOR THEIR LOSSES WERE REMEDILESS IF DENIED ACCESS TO THE COURT; THE LOWER COURT SHOULD NOT HAVE IMPOSED THE MOST DRASTIC SANCTION OF ALL--DISMISSAL OF THEIR CASES--FOR THEIR REFUSAL TO ACCEPT DEFENDANTS' SETTLEMENT TERMS

There can be no question but that it is the policy of the law to dispose of litigation on fair and reasonable terms if at all practicable and that the law favors the settlement and compromise of disputed claims, as was entered into in this case between defendants, the board of directors, and many of the Atlantic Palace unit owners. Nor do we say that the entry

into a compromise in settlement by other parties should be deemed to constitute evidence against the defendants or to serve as a basis for denial of a properly framed summary judgment motion.

In this case, the petitioners deemed the settlement terms to be inadequate and insufficient to compensate for their individual losses. True enough, it was possible that the costs of repair of the common elements would be less than $10 million and thus sufficient. But the other possibility is equally admissible: That the cost of repairs of the common elements would be so great that there would be no payment left to compensate the individual unit owners for their losses, diminished values, and inability to rent. Mediation, compromise, and settlement, as productive as they are, may not accomplish a fair and just outcome in a given dispute, and a defendant's settlement

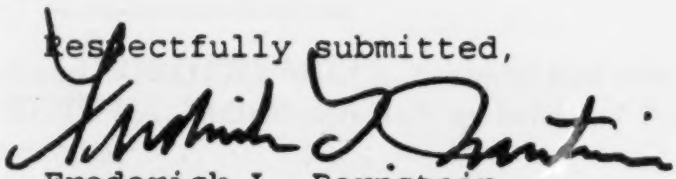
terms may not involve a remedy that is in an amount that is sufficient to deter antisocial conduct.

But the dismissal of a non-settling plaintiff's case, on motion before trial, for lack of expert reports on matters that all persons can see and understand, is the most drastic of all sanctions available to a court. We urge that the petitioners should have been afforded the effective assistance of independent counsel, not involved in the settlement, to oppose defendants' summary judgment motions, and that the District Court should not have left the petitioners virtually defenseless against the settling parties. To do otherwise, to fail to grant a continuance on defendants' motions to dismiss, was a radical departure from the accepted course of federal judicial practice in denying summary judgment in cases involving disputed facts and well-pleaded issues.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,



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Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5021

RESORT DEVELOPMENT CORPORATION

v.

PERINI CORPORATION, ET AL

* * *

District Court Civil No. 90-CV-00189

GAETANO MIELE and DOROTHY MIELE, husband and wife; MARGUERITE CHERIPKA, individually and for and on behalf of the Estate of James Cheripka, Deceased,
Intervenors-Appellants

KENT P. HASTINGS and JOANNE M. HASTINGS, husband and wife,
Appellants

Appeal from the United States District Court for the District of New Jersey
(Civil No. 90-cv-00189)
District Judge: Honorable Joseph E. Irenas

Entered: December 29, 1994

Submitted Pursuant to Third Circuit LAR 34.1(a)

December 16, 1994
Before: BECKER, GREENBERG and McKEE, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by the appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court entered December 1, 1993, be and is hereby affirmed.

It is also ADJUDGED AND ORDERED that the appeal of Kent P. Hastings and Joanne M. Hastings is dismissed for lack of standing. See Marino v. Ortiz, 484 U.S. 301, 304 (1988).

Costs taxed against appellants.

BY THE COURT:

/s/
Circuit Judge

ATTEST:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: Dec. 29, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE
HONORABLE JOSEPH E. IRENAS

Entered on the Docket: December 3, 1993
Filed: December 1, 1993

RESORT DEVELOPMENT CORP., :

Plaintiff, : Civil No. 89-4973

v. :

PERINI CORP., et al :

Defendants

DONALD W. WRIGHT, et al :

Plaintiffs : Civil No. 90-0189

v. :

PERINI CORP., et al :

Defendants

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* * *

ATLANTIC PALACE CONDOMINIUM ASSOCIATION, :

: Civil No. 90-1003

Plaintiff

v. :

PERINI CORP., et al :

Defendants.

ORDER OF DISMISSAL

The Court having been advised by the parties that the claims of all parties, including crossclaims, counterclaims, third, fourth and fifth party claims, have been settled, except for the claims of those parties which were dismissed by the Court's prior Orders of June 25, 1993 and September 3, 1993,

IT IS on this 1st day of December, 1993;

ORDERED that the above-captioned consolidated matters be and hereby are dismissed, with prejudice, and without costs to any party.

/s/ Joseph E. Irenas
JOSEPH E. IRENAS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE
HONORABLE JOSEPH E. IRENAS

Entered on the Docket: 6-28-93
Original Filed: June 25, 1993

RESORT DEVELOPMENT CORP., :

Plaintiff, : Civil No. 89-4973

v. :

PERINI CORP., et al :

Defendants

DONALD W. WRIGHT, et al :

Plaintiffs : Civil No. 90-0189

v. :

PERINI CORP., et al :

Defendants

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* * *

ATLANTIC PALACE CONDOMINIUM ASSOCIATION, :

: Civil No. 90-1003

Plaintiff

v. :

PERINI CORP., et al :

Defendants. :

O R D E R

This matter having been submitted by Report and Recommendation by the Honorable Joel B. Rosen, United States Magistrate Judge, pursuant to 28 U.S.C. §636(b)(1) and the court having considered the objections thereto, and for the reasons noted in the Report and Recommendation,

IT IS on this 25th day of June, 1993 hereby

ORDERED that defendant Perini Corporation's motion for summary judgment as against the Intervenor plaintiffs Gaetano Miele, Dorothy Miele, James Cheripka and Marguerite Cheripka is GRANTED. It is

FURTHER ORDERED that judgment is ENTERED against Gaetano Miele, Dorothy Miele, James Cheripka and Marguerite Cheripka on the intervenors' complaint in civil action no. 90-189. It is

FURTHER ORDERED that defendant Stevens & Wilkinson, Inc.'s motion for summary judgment as against the Intervenor plaintiffs Gaetano Miele, Dorothy Miele, James Cheripka and Marguerite Cheripka is GRANTED. It is

FURTHER ORDERED that judgment is ENTERED against Gaetano Miele, Dorothy Miele, James Cheripka and Marguerite Cheripka on the intervenors' complaint in civil action no. 90-189. It is

FURTHER ORDERED that the motion of I.C. Thomasson, Inc. on the third-party complaint is DENIED AS MOOT. It is

FURTHER ORDERED that judgment is ENTERED in favor of I.C. Thomasson, Inc. on S&W's third party complaint in civil action no. 90-189. It is

FURTHER ORDERED that the motion of Stanley D. Lindsey & Associates, ltd. on the third-party complaint is DENIED AS MOOT. It is

FURTHER ORDERED that judgment is ENTERED in favor of Stanley D. Lindsey Associates, Ltd. on the third-party complaint in civil action no. 90-189. It is

FURTHER ORDERED that all complaints of the above named intervenors in civil action no. 90-189 are DISMISSED WITH PREJUDICE.

No costs.

/s/ Joseph E. Irenas
JOSEPH E. IRENAS
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

June 17, 1993

Honorable Joseph E. Irenas
United States District Judge
401 Market Street
Camden, NJ 08101

Re: Donald W. Wright, et al v. Perini Corp., et al; Civil No. 90-189 (JEI) (Consolidated)

REPORT AND RECOMMENDATION

Dear Judge Irenas:

This Report and Recommendation is being submitted pursuant to 28 U.S.C. §636(b)(1)(B) upon four motions for summary judgment against four intervenor plaintiffs, James Cheripka and Marguerite Cheripka, and Gaetano Miele and Dorothy Miele (hereinafter "Intervenors"). Defendants Perini Corporation (hereinafter "Perini") and Stevens & Wilkinson, Inc. (hereinafter "S&W") seek summary judgment against the above named Intervenors. Third party defendants Stanley D. Lindsey

& Associates, Ltd. (hereinafter "Lindsey") and I.C. Thomasson Associates, Inc. (hereinafter "I.C. Thomasson") also move for summary judgment. These motions will be determined on a Report and Recommendation basis pursuant to 28 U.S.C. §636(b)(1)(B) because of the potentially dispositive nature of the requests.

After careful consideration of the submissions and oral arguments of the parties, and of the record as a whole, and for the reasons noted below, I respectfully recommend granting Perini's and S&W's motion for summary judgment as against the Intervenors and entering judgment in favor of S&W and Perini on the intervenor complaint. Because this ruling necessarily moots the other claims in this action, I also recommend entering judgment in favor of third party defendants Stanley D. Lindsey and I.C. Thomasson.

I. Background and Procedure

On January 19, 1990 suit was brought in the case of Donald W. Wright, et al v. Perini Corporation, et al, Civil Action No. 90-189. In that action a group of several hundred condominium unit owners brought suit against the constructor and architect of the Atlantic Palace alleging negligence and breach of warranty in the construction and design of the Atlantic Palace. On October 25, 1990 I granted Joseph Portogallo and twelve other unit owners the right to intervene in the Wright case.[1] On November 13, 1990 the intervenor complaint was filed.

The Atlantic Palace is a thirty story hotel-condominium complex located on the boardwalk in Atlantic City, New Jersey. Construction on this high-rise project began in September of 1985, and the

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[1]Only four of the original Portogallo group remain in this case. The remaining intervenors have tentatively accepted the proposed settlement. See infra at 4.

project was substantially completed by February of 1987. The building consists of a thirty story tower section and a three story low rise section. The low rise section of the project includes area to be leased as commercial space to small businesses. The tower portion of the project includes 293 residential condominium units.

Resorts Development Corporation (hereinafter "RDC"), a wholly owned subsidiary of U.S. Capital Corporation, was the developer and promotor of the condominium project. In 1985, RDC contracted with Perini Corporation to build the Atlantic Palace. U.S. Capital Corporation contracted with Stevens & Wilkinson, Inc., to design and supervise the construction of the Atlantic Palace.

Perini was the general contractor on the project. S&W was the architect who designed the building assisted by I.C.

Thomasson, the mechanical engineering consultant and Lindsay the structural engineering consultants.

Counts I and II of the intervenor complaint contain claims for negligence against Perini. These counts state that Perini's construction was performed in a negligent and unworkmanlike manner. These counts also state that Perini negligently deviated from the construction contract and from existing building and design standards in constructing the Atlantic Palace (Intervenor Compl., Counts I and II). The Intervenors further allege that Perini's negligence resulted in the Atlantic Palace containing numerous deficiencies including "water infiltration into plaintiff's unit, malfunctions, defects and omissions in construction, gross sealant failure and otherwise..." Id., Count I, 5.

Counts III, IV and V state claims

against S&W, the architect. In Count III the Intervenors allege that S&W failed to properly design and supervise the construction of the Atlantic Palace. In Counts IV and V, the Intervenors contend that S&W breached its duty to supervise the construction of the work and failed to discover the defects in the contractor's work in a timely fashion. Count V also states that S&W breached warranty claims under their contract.[2]

Both S&W and Perini answered the intervenor complaint, denying all material allegations. S&W impleaded I.C. Thomasson and Lindsey. There is no dispute that the Atlantic Palace has experienced extensive water infiltration problems since 1987. There is no general agreement, however, on the cause of the water infiltration.

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[2]The Intervenors do not have a contractual relationship with either Perini or S&W. Accordingly, the contracts are only relevant insofar as any negligent deviation therefrom can be used to support the Intervenors' negligence claims.

After an extensive mediation process, all but four of the intervenors and approximately 200 of the other residential condominium unit owners have tentatively settled all claims against the named defendants. The present motions seek summary judgment against the remaining four intervenors - James Cheripka and Marguerite Cheripka, and Gaetano Miele and Dorothy Miele. On November 12, 1992 this court severed the intervenors' claims to proceed to trial. A trial date has not been set pending disposition of the outstanding motions.

I have closely managed discovery and case management in this action. To this end, I have entered several orders establishing deadlines for the exchange of experts' reports. Initially, the plaintiffs were to submit their experts' reports by July 1, 1991, and the defendants were to submit their experts'

reports by October 1, 1991. The deadline for defendants' experts' reports was later extended to December 1, 1991, and then to January 6, 1992. The subcontractors' experts' reports were initially due on March 1, 1992, and that deadline was extended to May 1, 1992.[3]

The experts' reports prepared in this action are voluminous, and reveal the inherent complexity of a case involving the structure, engineering and design of a thirty story complex. All of the parties in this case recognize that the liability, causation and damages issues require expert testimony. (Plfs.' Memo. in Opp. to Mot. for Summary Judgment at 5).

Despite the passage of the deadlines for discovery and the retention of experts, the Intervenors have not retained

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[3]The subcontractors are parties to the other litigation involving the Atlantic Palace, but are not parties to the intervenor complaint.

an independent expert. Their brief in opposition to the pending motions is devoted entirely to the contention that they will be utilizing experts retained on behalf of the plaintiff Atlantic Palace Condominium Associates ("the Association") to support their claims. The Intervenors maintain that as unit owners and members of the Association they can utilize the Association's experts and consequently, they did not retain independent experts.[4] Id. at 2,6.

However, the record reveals that the Association's experts will not testify on

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[4] The Intervenors maintain that they will be using some or all of the following experts to establish the elements of their case and the liability, causation and damages issues: (a) Coopers and Lybrand - loss of profits and diminution on value; (b) Bernard Schwartz and Associates, engineering firm - on structural issues; (c) Rocca Associates - appraised the Atlantic Palace; (d) Burt Hill Rittelman Kosar Associates - structural, cladding, mechanical design and cost estimate reports.

Perini argues that even were the Intervenors to retain any of the above experts, none of these expert reports reference the liability of the general contractor but instead relate to proof of damages, and liability of the design team.

the Intervenors' behalf. Bernard Schwartz and Associates ("Bernard Schwartz"), one of the Association's experts, wrote Mr. Ferry on January 6, 1993, informing him, in no uncertain terms, that for conflict of interest reasons, Bernard Schwartz could not serve as their expert in this action. (See Letter from Bernard Schwartz and Associates dated January 6, 1993). Mr. Schwartz stated, "our company policy is not to participate in the same case with another attorney. There is a conflict of interest." (Letter from Bernard Schwartz, P.E., dated January 6, 1993 (emphasis in original))

This crucial fact was brought to the court's attention, not by Mr. Ferry, but by counsel for Perini, David S. Mackay, Esquire in a letter to this court dated January 29, 1993. During oral argument, held three months after Bernard Schwartz' letter, Mr. Ferry confirmed that Bernard

Schwartz would not serve as the intervenors' expert. Mr. Ferry also indicated that he had not attempted to retain an alternate expert nor did he have any present intention of doing so.[5] Thus, despite the complexity of the issues, and the concession that an expert is essential to proof of their claim, the Intervenors have not retained an expert.[6]

II. Discussion

The standard for summary judgment is

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[5]Even had Mr. Ferry sought to retain an expert at this late date, Mr. Ferry has failed to show "good cause" as to why the scheduling order should be altered to allow for this change. It is highly problematic as to whether retention of an expert at this time would be permitted. See Rule 16(b), Fed.R.Civ.P.

[6]The Intervenors offer no legal authority for the proposition that they can utilize the Association's experts merely because they paid Association dues. Moreover, this court knows of no authority which would compel an expert to testify when ethical constraints bar her from doing so. In fact, the New Jersey courts have long held that individuals cannot be compelled to give expert testimony. See Stanton v. Rushmore 112 N.J.L. 115, 116 (E & A 1934); see also Genovese v. New Jersey Transit Rail Operations, Inc., 234 N.J. Super. 375 (1989).

a stringent one. A court may grant summary judgment only when the materials of record show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Tudor Dev.Group, Inc. v. United States Fidelity & Guar.Co., 968 F.2d 357, 359-360 (3d Cir. 1992). In deciding whether there is a disputed issue of material fact, the court must resolve doubts in favor of the non-moving party. Desvi, Inc. v. Continental Ins.Co., 968 F.2d 307, 308 (3d Cir. 1992). The threshold inquiry is whether there are "any genuine factual issues that can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

A motion for summary judgment must be granted if the party opposing the motion

"fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Moreover, once the moving party has carried its burden of establishing the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). This burden may be discharged upon showing the absence of evidence necessary to support the non-moving party's case. Id. at 323-325. The non-moving party may not rest upon the mere allegations or denials of his pleadings, Fed.R. Civ.P. 56(e), and "must do more than simply show that there is some metaphysical doubt as to material facts." Matshuita Elec.Indus.Co. v. Zenith

Radio Corp., 475 U.S. 574, 586 (1986).

This court recently held that "material" facts are those that affect the outcome of a lawsuit under the applicable law, and material facts are "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the non-moving party. Bradgate Associates, Inc. v. Fellows, Read and Associates, Memorandum 1992 WL 88120 (D.N.J. 1992). Thus, if the non-movant's evidence is merely "colorable" or is "not significantly probative," the court may find that no genuine issue of material fact exists and proceed to determine the case as a matter of law. Anderson, 477 U.S. at 249-250.

A. S&W's Motion for Summary Judgment as against the Intervenors.

S&W moves for summary judgment on behalf of the design group which consists of the architect, S&W, the structural

engineer, Stanley G. Lindsey & Associates, and the mechanical engineer, I.C. Thomasson.[7]

S&W maintains that in a professional malpractice action, such as the case at hand, a plaintiff must provide expert testimony from a member of the defendant's profession in order to establish that the defendant deviated from the appropriate standard of care. The Intervenors have not rebutted this contention.

In their complaint the Intervenors allege that the design group was negligent in the design and supervision of the Atlantic Palace project. Because the Intervenors' claims are unsupported by expert testimony, S&W contend that summary judgment should enter in their favor pursuant to Rule 56. I agree.

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[7]The summary judgment motions filed on behalf of Lindsey and I.C. Thomasson will be addressed later in this Report and Recommendation.

There is no general rule or policy requiring expert testimony as to the standard of care in a tort action. "The test of need of expert testimony is whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the party was reasonable." Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982); see also Macri v. Ames McDonough Co., 211 N.J. Super. 535, 642 (App.Div. 1986); Bushman v. Halm, 798 F.2d 651, 659 (3d Cir. 1986).[8]

When a case concerns a level of care required of a professional, the standard is usually determined on the basis of

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[8]A federal court sitting in diversity is bound apply the substantive law of the state in which it sits. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Because jurisdiction in this action is based upon diversity of citizenship, the law of New Jersey supplies the rules and principles of tort liability. See Travelers Indemnity Company v. Ewing, Cole, Erdman & Eubank, 711 F.2d 14, 17 (3d Cir. 1983).

expert testimony. Travelers, 711 F.2d at 17. Often, in a professional malpractice action, an expert may be necessary in order to establish whether the professional rendered services consistent with the standards of the profession. See Travelers, 711 F.2d at 17; Bartak v. Bell-Galvardt & Wells, Inc., 629 F.2d 523, 531 (8th Cir. 1980); Rosenberg v. Cahill, 99 N.J. 318, 325 (1985); Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982); Sanzari v. Rosenfeld, 34 N.J. 128, 134-135 (1961).

In the case of an architect, the level of care expected is that of a reasonably prudent architect. Travelers, 711 F.2d at 16. In the engineering profession, "allegations of professional malpractice must be supported by expert testimony." Bradgate Associates, Inc. v. Fellows, Reed and Associates, Memorandum 1992 WL 88120 *2 (D.N.J. 1992); Bartak,

supra; Applegate v. Dobrovir, Oakes & Gebhardt, 628 F. Supp. 378, 382 (D.D.C. 1985); Rosenberg v. Cahill, 99 N.J. 318, 325 (1985). Absence of expert testimony may be fatal in a professional negligence action if the issues are not within the common knowledge of the jurors. Bradgate, 1992 WL 88129 *2.

Under the common knowledge doctrine, expert testimony is not necessary when the negligence of the defendant is "readily apparent to anyone of average intelligence and ordinary experience." Rosenberg, 99 N.J. at 375; see e.g., Sanzari, 34 N.J. at 140. In those instances, the jury supplies the appropriate standard of care, not the expert. Id. The common knowledge doctrine is applied in malpractice actions when "the issue of negligence is not related to technical matter peculiarly within the knowledge of the [professional]." Id., (citing Sanzari, 34

N.J. at 142). Guided by these principles, I will address the present motions.

It is undisputed that expert testimony is necessary to prove that S&W deviated from the standard of professional care and practice applicable in the engineering profession. Bradgate, 1992 WL 88129 *2; Bartak, supra; Applegate v. Dobrovir, Oakes & Gebhardt, 628 F.Supp. 378, 382 (D.D.C. 1985); Rosenberg v. Cahill, 99 N.J. 318, 325 (1985). The Intervenors conceded both in their moving papers and during oral argument that they must have an expert to prove their claims against S&W, I.C. Thomasson and Lindsey. (See Plfs.' Mem. in Opp. at 11-13).

Clearly, without an expert, a rational jury could not find S&W liable. In Counts III, IV and V of the intervenor complaint, the Intervenors allege that S&W deviated from an acceptable standard of architectural care and practice in the

performance of their duties on the Atlantic Palace project. The issues relevant to the Intervenors' claim concern whether S&W rendered professional engineering services consistent with the accepted standards of the profession. Notwithstanding this fact the Intervenors have failed to come forward with an expert which they Intervenors concede is crucial to establishing their claims and unraveling the liability issues surrounding the architectural and engineering questions presented in this litigation. The Intervenors' claims are too complex and intricate for a lay person to understand without the aid of expert testimony. A lay juror could not determine whether S&W deviated from the applicable standard of care owed by an architect, analyzing blueprints, drawings and plans without the aid of expert testimony.

Moreover, S&W has presented expert reports which they contend absolve them from liability. The Intervenors cannot rebut these findings without their own expert. Accordingly, I respectfully recommend that summary judgment be entered in S&W's favor on the Intervenors' theory of liability for the negligent performance of their duties regarding the design and supervision of the Atlantic Palace.

B. Perini's Motion for Summary Judgment as Against the Intervenors.

Perini's argument for summary judgment parallels S&W's. Perini maintains that a plaintiff must present expert testimony in order to establish negligent construction on the part of the general contractor. Because the Intervenors' claims are unsupported by expert testimony, Perini maintains that the Intervenors would not be able to prove liability, causation or damages and thus

Perini is entitled to judgment as a matter of law pursuant to Rule 56. Again, I agree.

It is undisputed that the Intervenors' claims cannot be established without the aid of expert testimony. As stated previously, the Intervenors conceded in their moving papers and during oral argument that expert testimony will be required on all of their claims against Perini. (See Plfs.' Mem. in Opp. to Mot. for Summary Judgment at 11-13). The standard of care owed by a general contractor and the claims that Perini failed to use its best skill, judgment and attention in the construction of the project, the Intervenors' admit require expert testimony. Furthermore, expert testimony is necessary on the claims that Perini failed to build the Atlantic Palace in accordance with the construction contract, drawings and specifications and

also on the damage claims of lost rental profits and diminution in value. Id.

As stated in Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982), "[t]he test of need of expert testimony is whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the party was reasonable." When the question of causal relationship is so esoteric that lay minds cannot form an intelligent judgment about it without expert aid, an opinion from an expert may be required. Bushman v. Halm, 798 F.2d 651, 659 (3d Cir. 1986); see also Walker Rogge, Inc. v. Chelsea Title & Guaranty Co., 122 N.J. Super. 363, 376 (App.Div. 1980) rev'd on other grounds, 115 N.J. 517 (1989) (expert required because "a valid judgment on the issue of a land surveyor's negligence could not be formed by the application of common

judgment and experience.")

While New Jersey courts have not had an opportunity to consider directly whether expert testimony is required in cases involving the standard of care owed by a general contractor, other jurisdictions have confronted the issue and have required expert testimony involving similarly complex issues. See Nelson v. Abbott, 16 Phila. 484 (C.P. 1987) (Expert testimony required to establish negligent design and construction of highway); Miller v. Los Angeles County Flood Control District, 505 P.2d 193, 202 (Ca. 1973) (Negligent construction of plaintiff's residence required expert testimony).

Categorizing Perini, the general contractor on this project as a "professional", for the purpose of requiring expert testimony, is appropriate. As the New Jersey Supreme

Court stated, "it is clear that the term 'professional services' is no longer limited to the traditional professions such as law and medicine." Autotote, Ltd. v. New Jersey Sports & Exposition Authority, 85 N.J. 363, 371 (1981). The legal rules applicable in those professions should be extended to apply in the case of general contractors. The issues and principles involved in the construction industry are usually beyond the common knowledge of the average person. For instance, compliance with building codes, the costs and benefits of various building materials, and other similar issues which inevitably arise during the construction of a modern thirty story hotel/condominium complex, require technical expertise well beyond the ken of the average person.

The Intervenors' failure to supply expert testimony in this instance is fatal

to their cause of action against Perini.

In Counts I and II of the intervenor complaint, the Intervenors allege that Perini deviated from the standard of care and the specifications of the Construction Plan in constructing the Atlantic Palace, and further that the construction was performed in a negligent and unworkmanlike manner.

The alleged negligent construction of the Atlantic Palace involves questions outside the scope of the average lay person's general knowledge of the construction industry. The average person is unfamiliar with the standard of care applicable to a general contractor. The alleged defects in this case are not obvious acts of negligence. An average juror could not find liability on the part of Perini regarding its compliance with hundreds of pages of contract specifications, plans and shop drawings.

More importantly, an average juror could not determine which of these deviations, if any, caused the alleged problems with the structure without the aid of an expert. The complexity of the issues in this litigation are "so esoteric that jurors of common judgment and experience are unable to make a determination without benefit of an opinion presented by an individual with specialized knowledge." Macri v. Ames McDonough Co., 211 N.J. Super. 535, 642 (App.Div. 1986).

Finally, Perini has presented expert reports which they assert absolve them from negligence in the construction of the Atlantic Palace. The Intervenors can not rebut these experts without the aid of expert testimony. Accordingly, I respectfully recommend that summary judgment be entered in Perini's favor on the Intervenors' theory of liability for the negligent construction of the Atlantic

Palace.

C. Other Motions

The other motions before this court involve issues concerning claims for derivative liability arising out of S&W's alleged liability regarding the Atlantic Palace. Because the above holding recommends entering judgment in favor of S&W, the motions brought on behalf of Lindsey and I.C. Thomasson for summary judgment against the Intervenors are necessarily mooted. Accordingly, I recommend denying as moot I.C. Thomasson's motion for summary judgment and Lindsey's motion for summary judgment against the Intervenors.

D. Conclusion

For the foregoing reasons, I respectfully recommend granting Perini's and S&W's motion for summary judgment against the remaining Intervenors. I also recommend denying as moot I.C. Thomasson's

and Lindsey's motion for summary judgment against the Intervenors.

I am filing this Report and Recommendation with the Clerk of the Court and sending a copy of same to all counsel of record. Any objections to this Report and Recommendation must be filed within ten (10) days of service pursuant to General Rule 40D(5) and Rule 72(b), Fed.R.Civ. P.

Very truly yours,

/s/ Joel B. Rosen

JOEL B. ROSEN
United States Magistrate Judge

THE ATLANTIC PALACE
where new york avenue meets the boardwalk

227 Boardwalk • Atlantic City • New Jersey

March 31, 1987

Mange Chips
1 E Ridgewood
P.O. Box 547
Paramus, NJ 07652

Dear Mr. Chips:

Would you like to own an oceanfront condominium with outstanding value?

If that condominium was on the Boardwalk in the heart of Atlantic City's Casino Row amidst the glamour of the star studded shows and the glitter of the bustling casinos, would you still be interested?

If it was an elegant self-contained resort with all the amenities and conveniences of a fine hotel, would you be even more interested?

If so, you'll love the Atlantic Palace. It's in the heart of the action, yet when you're through with the action

you can enjoy all the benefits of your own exclusive resort. Consider:

- The Promenade Level - You will luxuriate in a year-round heated, indoor/outdoor swimming pool in a half acre garden-like setting overlooking the Boardwalk. Also there are saunas, hot tubs, steamroom, and exercise equipment to keep you fit and relaxed.

- The Boardwalk Level will feature a gourmet delicatessen and space for exclusive shops.

- The Atrium Level boasts additional exclusive shops as well as another restaurant and intimate lounge for your added convenience.

This palatial thirty story condominium now towers over the Atlantic City skyline. A limited number of residences - each with spectacular ocean views - are available at prices starting at $157,000 including complete decorator

furnishings and accessories.

Moreover, we have outstanding financing options.

Call me today, toll free 1-800-221-0515 for all the details on this exciting opportunity. In New Jersey, call 1-800-221-0513.

Sincerely,

/s/ Bill Hrisko
William C. Hrisko, Vice President
Director of Presales

P.S. Purchasing now and closing this spring allows you and your family to take advantage of the maximum tourist season.

MEMORANDUM

Meridian

To: Meridian Mortgage Loan Committee

Date: July 17, 1985

From: James F. Fogarty

Company: Meridian Mortgage

Subject: New Submission - Construction - Condominium
Loan Amount - $38,900,000
MMC Participation - $870,000

Atlantic Palace - 293 Units
Atlantic City, New Jersey

This is a request for a $870,000 participation in a $38,900,000 loan for the construction of the Atlantic Palace. The proposed project will consist of 293 dwelling units plus 28,372 S.F. of commercial space. The loan term will be 21 months with two three-month extensions at Central Penn's National Commercial Rate plus 1-1/2% reducing to 1% at such time as borrower achieves a firm 82% presale (240 units). Meridian Mortgage will be paid a

total of $152,500 for originating, servicing and participating in the loan.

The borrower will be Resort Development Corporation, a wholly owned subsidiary of U.S. Capital Corporation. U.S. Capital is the acknowledged leader in Resort Condominium development and finance on the east coast of the United States. At present, Central Penn has $1,056,624 outstanding to U.S. Capital on Getlinburg Summit III, a loan which MMC leads and which is being handled as agreed.

The project will consist of 293 living units with 208 suites, 54 one-bedroom units, 27 two-bedroom units and 4 penthouses. The proposed commercial space will involve 12 units located on both the Boardwalk as well as on the second story with a Boardwalk view. The dwellings will range in price from $141,492 to $359,000

with an average selling price of $172,000 and a total sellout of $50,403,072. The selling range of the commercial space will vary with its size and proximity to the Boardwalk with a projected sellout of $4,550,000.

Meridian Mortgage Corporation
555 East Lancaster Avenue
P.O. Box 6800
St. Davids, PA 19087
(215)293-9616

Meridian

Samuel J. Greenblatt
Senior Vice President

July 18, 1985

Resort Development Corporation
P.O. Box 11496
Columbia, SC 29211

Re: Atlantic Palace - 293 Condominium Units - Atlantic City, New Jersey

Gentlemen:

We are pleased to advise you that we have approved your application for land acquisition and construction financing, on the terms herein set forth. Upon receipt by us of a copy of this letter, executed and accepted by you, we agree to lend and you agree to borrow the amount set forth below on the following terms and conditions:

1. Loan. Meridian Mortgage Corporation ("Meridian") will lend the sum

of $38,900,000 for the term of twenty-one (21) months as follows:

(a) Until Borrower has presented to us satisfactory evidence of "sales" (as defined in paragraph 5 hereof) of at least 240 dwelling units, interest on the outstanding principal balance of the loan shall be due and payable on the first day of each calendar month at an interest rate of one and one-half (1 1/2%) percent above the National Commercial Rate of interest announced by Central Penn National Bank from time to time, which will be adjusted from time to time as such rate changes; and

(b) For the balance of the loan term, interest on the outstanding principal balance of the loan shall be due and payable on the first day of each calendar month at an interest rate of one (1%) percent above the National Commercial Rate of interest announced by Central Penn

National Bank from time to time, which will be adjusted from time to time as such rate changes.

Meridian Mortgage Corporation
555 East Lancaster Avenue
P.O. Box 6800
St. Davids, PA 19087
(215)293-9616

Meridian

James F. Fogarty,
Vice President

January 31, 1986

Perini Corporation
73 Mt. Wayte Avenue
Framingham, MA 01701

Re: The Atlantic Palace
New York Avenue and the Boardwalk
Atlantic City, New Jersey

Gentlemen:

This letter will advise you that we have entered into a Building Loan Agreement with Resort Development Corporation ("Borrower") for the purpose of financing the acquisition and construction of the above premises. You are serving as general contractor for the project under a contract in the amount of $27,000,000 (the "Construction Contract.").

Borrower has requested us to confirm

to you certain aspects of our loan to Borrower and we are willing to do so, provided that in no event shall the matters herein set forth make us responsible or liable to you or your subcontractors or suppliers for our disbursement of or failure to disburse the loan or any part thereof and neither you nor any of your subcontractors or suppliers shall have any right or claim against us (as a third party beneficiary or otherwise) under our Building Loan Agreement or by virtue of our administration thereof.

Subject to the foregoing qualifications, we confirm to you that we have allocated in our loan the sum of $26,419,425 in connection with the Construction Contract. The balance of funds required in order to pay for construction of the project under the Construction Contract, i.e., $580,575, is

required to be deposited with us by the Borrower to be disbursed by us. It is anticipated that Borrower will obtain such sums from cash deposits of unit purchasers at the Atlantic Palace by substituting a letter of credit for such cash deposits. We have agreed to provide such letter of credit. To date we have disbursed from the loan the sum of $1,096,880 in connection with sums due under the Construction Contract. To the extent you have received sums in excess of such amount, such sums have been paid from Borrower's funds. The balance of funds in the loan allocated to the Construction Contract is $25,322,545.

D E E D

THIS DEED is made on March 30, 1987, between RESORT DEVELOPMENT CORPORATION, a Delaware Corpration, having an office at 2727 Boardwalk, Atlantic City, New Jersey ("Grantor") and James P. Cheripka and Marguerite Cheripka, h/w, having an address at 165 Jerome Avenue, Paramus, NJ 07652 ("Grantee").

TRANSFER OF OWNERSHIP. The Grantor grants and conveys (transfers ownership of) the property described below to the Grantee. This transfer is made for the sum of One hundred seventy-two thousand and No/loo ($172,000.00). The Grantor acknowledges receipt of this money.

TAX MAP REFERENCE. (N.J.S.A. 46:15-2.1) Municipality of Atlantic City. Block 25, Lot 17, 18, 97, 100 and 119.

PROPERTY. The property consists of a condominium unit located in the City of Atlantic City, County of Atlantic, State

of New Jersey and is more particularly described as follows:

* * *

Being Condominium Unit No. 2910 in The Atlantic Palace. . .together with an undivided .003133 percentage interest in the common elements of The Atlantic Palace, a Condominium.

* * *

D E E D

THIS DEED is made on February 12, 1988, between RESORT DEVELOPMENT CORPORATION, a Delaware Corpration, having an office at 2727 Boardwalk, Atlantic City, New Jersey ("Grantor") and Gaetano Miele and Dorothy Miele, h/w, having an address at R.D.#1, Box 60, Lehighton, PA 18235 ("Grantee").

TRANSFER OF OWNERSHIP. The Grantor grants and conveys (transfers ownership of) the property described below to the Grantee. This transfer is made for the sum of Two hundred thirty-five thousand and No/1oo ($235,000.00). The Grantor acknowledges receipt of this money.

TAX MAP REFERENCE. (N.J.S.A. 46:15-2.1) Municipality of Atlantic City. Block 25, Lot 17, 18, 97, 100 and 119.

PROPERTY. The property consists of a condominium unit located in the City of Atlantic City, County of Atlantic, State

of New Jersey and is more particularly described as follows:

* * *

Being Condominium Unit No. 0601 in The Atlantic Palace. . .together with an undivided .512000 percentage interest in the common elements of The Atlantic Palace, a Condominium.

* * *

ZETLIN-ARGO STRUCTURAL INVESTIGATIONS, INC.

ATLANTIC PALACE

FINAL REPORT

Causes of Leakages

* * *

Wiss, Jenney, Elatner Associates, Inc.

CONDITION SURVEY

ATLANTIC PALACE SUITES

ATLANTIC CITY, NEW JERSEY

APRIL 5, 1991

At the request of Dr. Lev Zetlin-Argo Structural Investigations, Inc., Wiss, Janney, Elstner Associates, Inc. (WJE) performed a visual condition survey of visible exterior and interior surfaces at the Atlantic Palace Suites in Atlantic City, New Jersey. Observations at the building plaza area, probe openings and various tests were also performed under the direction of Morris Kaufmann (Zetlin

Argo).

The condition survey and field observations were performed from February 11 to March 13, 1991. WJE staff involved in the field effort were Kisball J. Beasley, Matthew C. >Farmer, James R. Triano, Jennifer P. Wentzien, and Steven V. Fechino. Structural Maintenance Systems, Inc. provided labor and equipment for scaffold access, testing, plus coring/probing and patching. Atlantic Palace Suites management assisted with access and information on active or past water leakage.

* * *

C. SUMMARY OF CONCLUSIONS

The Atlantic Palace residential units contain mechanical circulating air systems. These systems as designed and constructed are inadequate and inappropriate as ventilation systems, because of the following:

1. They do not comply with BOCA/84 requirements for natural ventilation:

a) Windows are fixed.

b) Doors, where these exist, are of inadequate size.

c) There are no other means of providing outside air into the residential units.

2. They do not comply with BOCA/84 requirements for mechanical ventilation.

a) The heat pump units have no outside air provisions, but serve as circulating units only.

b) Toilet recirculating units, as provided, violate BOCA/NMC-84 requirements prohibiting recirculation of toilet air.

c) No kitchen exhaust air system is provided.

3. They do not comply with ASHRAE standards (or other accepted practice):

a) No natural ventilation.

b) No mechanical ventilation.

4. They do not provide tenants with minimum requirements for comfort and health.

a) Lack of ventilation has contributed to growth of fungus (mold).

b) Lack of ventilation has contributed to existing unpleasant odors throughout the Tower.

THE ATLANTIC PALACE RESIDENTIAL UNITS WERE NOT PROVIDED WITH VENTILATION AIR AS DEFINED AND MANDATED BY THE CODES AND IN COMPLIANCE WITH ACCEPTED PRACTICE.

The Atlantic Palace

ATLANTIC CITY REPORT

ecember, 1986 Volume 1, Number

Atlantic Palace Will be Ready for Occupancy in February '87

FORECAST: Construction of Resort Development Corporation's Atlantic Palace is presently scheduled for completion by the end of 1986. Beginning in January, 1987, furniture will be installed in the 293 condominium apartments. Owners and their guests should be staying in the building by late February.

The Atlantic Palace luxury condominium resort, at New York Avenue and the Boardwalk in Atlantic City, will be ready for your inspection by late February, 1987.

Construction progress as of October 31:

- More than half of the tower—floors four through 18—is in the final stage of completion. Walls are being painted and wallpapered; carpets are being installed.
- In the rest of the tower—floors 19 through 30—drywall, cabinets and major appliances are being installed.
- Building safety systems—including smoke and fire alarms—are being tested.
- Work on level three, with its swimming pool and terrace, is in progress and on schedule.
- Site work is beginning. The preliminary steps for repaving New York Avenue are underway. Planters are being installed.
- The exterior of the building is being painted with its special protective coating.

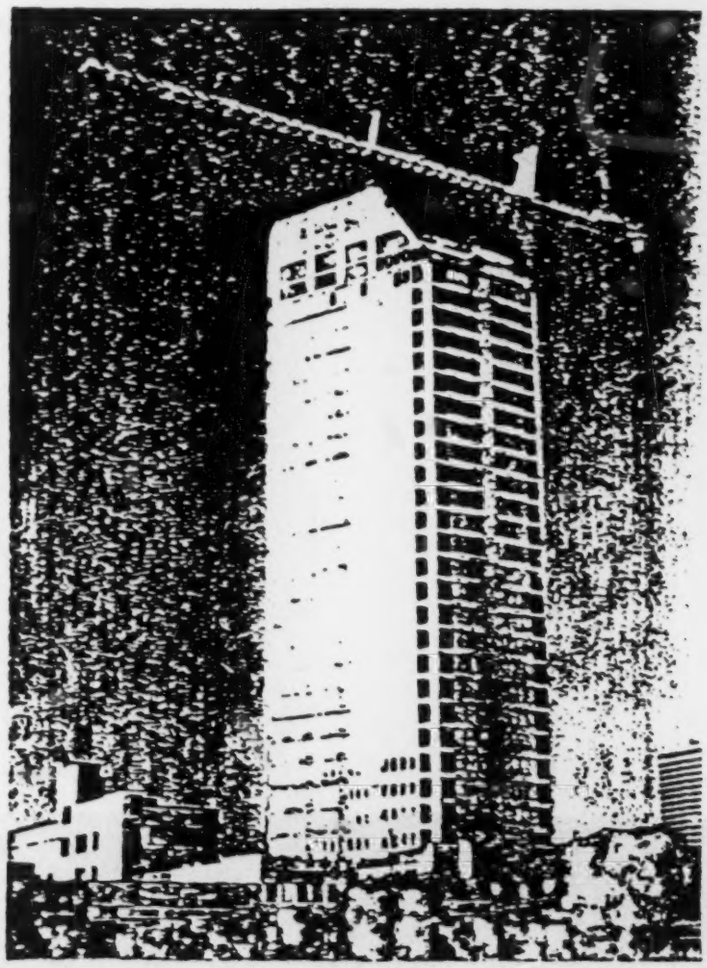
"By mid-November, we should begin locking up the lower floors, which means they are finished and inspected," says Don Points, executive vice president of Resort Development Corp. "The public areas on the first, second and third floors are being completed, and should finish up with the last of the living units."

The seven-level garage is just about complete. And the 11 commercial spaces will be ready to be finished and decorated by their owners.

Roger McElfresh is supervising the construction for the general contractor, Perini Corp., based in Framingham, Mass. "All our work is geared toward completing the building by mid- to late December, 1986," he says.

Furniture installation is scheduled to begin the first week of January, 1987, according to Don Points.

Soon, your Atlantic Palace luxury condominium, located in the center of the action on Atlantic City's Casino Row, will be ready for your enjoyment.



The 30-story Atlantic Palace, located on the Boardwalk in Atlantic City, is scheduled to open in February.

Atlantic Palace Sales Office Is Now at 2727 Boardwalk

The next time you come to see us, you'll notice—we've moved.

The sales office for both Resort Development Corp. properties in Atlantic City—The Enclave and The Atlantic Palace—is now at 2727 Boardwalk. That's Iowa Avenue and the Boardwalk.

We're in the Ritz Building, next to the Tropicana Hotel and Casino. Visitor valet parking is available at the Ritz. Just turn onto Iowa Avenue, head toward the beach, and pull into the circular driveway on your left, the main entrance to the Ritz. Then walk up to the Boardwalk and into our office.

Our phone numbers have not changed. You can call us toll-free at 1-800-221-0513 in New Jersey and 1-800-221-0515 outside of New Jersey. Our local phone number is 609-345-3900.

Don't hesitate to contact us.

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